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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 386

RISS AND COMPANY, INC., a Corporation, and TRANSPORT MANUFACTURING & EQUIPMENT COMPANY, a Corporation,
Appellants,

vs.

STATE OF MISSOURI ex inf. JOHN M. DALTON, Attorney General,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

MOTION TO DISMISS OR AFFIRM APPEAL AND BRIEF IN SUPPORT THEREOF.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM APPEAL.

Comes now the State of Missouri, appellee above designated, by John M. Dalton, its duly elected, qualified and acting Attorney General, and moves this Court to dismiss

this appeal or in the alternative to affirm the decision of the Supreme Court of Missouri, for the following reasons:

1. The issues attempted to be raised by appellants on this appeal do not present any substantial federal question for determination by this Court.

2. There is not sufficient evidence in the record upon which this Court could base a determination of the issues attempted to be raised by appellants.

3. The issues attempted to be raised by appellants have been repeatedly decided adversely to the contentions of appellants by the previous decisions of this Court.

Wherefore, appellee prays that this appeal be dismissed or that the decision of the Missouri Supreme Court be affirmed.

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BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM APPEAL.

STATEMENT OF FACTS.

In the statement contained in appellants' jurisdictional statement there are misstatements as to the facts and also conclusions which are not justified by the record in the case. Therefore, the State of Missouri feels that it is necessary to correct such misstatements and to present to the Court additional facts necessary for consideration of the issue now before this Court.

On page 5 of appellants' jurisdictional statement it is alleged that the Missouri officials demanded that all of appellants' vehicles which used Missouri highways be fully licensed in Missouri. This is not a correct statement of the position of the State of Missouri. The State of Missouri contended that all of appellants' vehicles which used the highways of the State of Missouri were required to be licensed so that they could legally operate on the highways of the State of Missouri. This could be accomplished either by license issued by the State of Missouri or by a license which would qualify the owner of the vehicle to reciprocity for the operation of such vehicle on the highways of the State of Missouri without registration and licensing of such vehicle in the State of Missouri.

Reference is made to the requirements of the Missouri Public Service Commission law. However, no issue as to such law was litigated in the State of Missouri, and the Supreme Court of Missouri pointed out in its opinion that

the construction of the Missouri Public Service Commission laws was not in issue in this case.

Appellants state that many of their tractors used the highways of Missouri only once or twice a year, and then only for a trip to the overhaul base located in Kansas City, Missouri. The records of truck movements which were presented in evidence do not substantiate this claim. These records show that the movements of appellants' vehicles were movements wherein the tractors were pulling a trailer with a load of freight thereon.

Appellants state that states other than Missouri, in which they operated their vehicles, were demanding that some Riss vehicles be licensed in such states. Testimony produced by appellants was to the effect that only the State of Oklahoma made any specific demands for license plates and that such demand was that approximately 20 tractors and trailers be licensed in the State of Oklahoma. There was never any showing as to the basis for this demand and there was never any contention that such demands were based on the laws of Oklahoma. There was no testimony that any other state made any demand for license upon appellants, and there was no contention that the laws of any other state required appellants to register vehicles in such states. Further, and more specifically, appellants did not claim that as to the states of New York and New Jersey, Pennsylvania, Delaware and Kentucky (where the vehicles in question were actually licensed), that any official demanded that any such vehicles be licensed in any such states or that the laws of such states required that any vehicles be licensed therein.

Appellants refer to extensive negotiations between their representatives and officials of the State of Missouri looking toward a settlement of the issues litigated in this case.

It should be pointed out that such negotiation was not a good faith attempt to discover a manner whereby appellants could comply with the laws of Missouri, and the Supreme Court of Missouri so found. Likewise, the Supreme Court of Missouri found that the appellants did not and could not, in good faith, contend for any construction of the Missouri statutes other than that applied by the Supreme Court of Missouri. It was also pointed out that appellants did not, in fact, buy licenses for their vehicles on the basis of any theory or construction for which they contended in negotiations with officials of the State of Missouri.

Likewise, the Supreme Court of Missouri found that appellants did not in good faith attempt to secure a judicial construction of the statutes of Missouri.

The judgment of ouster handed down by the Supreme Court of Missouri in this case was based upon a finding that appellants, and both of them, acting together and individually, followed a course and practice of deliberate, premeditated and continuous, knowing violation of the laws of Missouri.

As to the fact situation which gives rise to the issues at bar it is hoped that the following brief resumé of the evidence will be sufficient. At all times herein pertinent Riss and Company, Inc., was a corporation duly organized and existing under the laws of the State of Colorado. Transport Manufacturing & Equipment Company, a corporation, was a corporation duly organized and existing under the laws of the State of Illinois. Both are licensed to do business in Missouri as foreign corporations and both maintain their principal office and business headquarters in Kansas City, Missouri. Both are owned, controlled and operated by Mr. R. R. Riss, Sr., and members of his family. Riss is a certificated carrier in both interstate and intra-

state commerce in the State of Missouri, with certificates from the Interstate Commerce Commission and from the Missouri Public Service Commission.

TM&E has no certificates and does not operate any vehicles. It is used by Riss for the purpose of buying equipment on credit and to avoid interstate commerce commission credit regulations as to purchase by carriers. In about the middle of the year 1954, TM&E purchased and leased to Riss a fleet of approximately 500 new automotive tractors and 1,300 semi-trailers. Prior to delivery of this new fleet Riss performed the bulk of its operations with tractors leased from various individuals residing in many different parts of the country. Such individual lessors generally became employees of Riss and drove the vehicles so leased for Riss. During this time TM&E owned a fleet of approximately 800 trailers which were operated in conjunction with the tractors leased as above

After the delivery, commencing in the middle [redacted] 1954, of the new fleet of vehicles mentioned above, Riss operated primarily with such fleet and leased from individuals only for supplementary equipment.

After delivery of this new fleet of vehicles TM&E held title to approximately 500 automotive tractors and 1,300 trailers, together with certain real estate, terminals, etc. All of these were leased to Riss on long-term leases. TM&E did not, itself, operate any vehicles and did not lease to any one other than Riss. The leases between TM&E and Riss provided for payments in an amount sufficient only to reimburse TM&E for its costs and overhead expenses. It was not contemplated that any profit would result to TM&E from such leases. The leases provided that Riss was responsible for the payment of all license fees and taxes.

When the approximately 500 tractors were delivered in 1954, they were licensed in the states of Oklahoma, Missouri, Kentucky, New Jersey and New York. In the first part of 1955, the Kentucky licenses were eliminated and the vehicles were licensed in the States of Oklahoma, Missouri, New Jersey and New York. In the last part of 1955, the New York licenses were transferred to the State of Pennsylvania and the vehicles were licensed in the states of Oklahoma, Missouri, New Jersey and Pennsylvania. In 1956, the Pennsylvania licenses were transferred to the State of Delaware and the vehicles were licensed in the states of Oklahoma, Missouri, New Jersey and Delaware.

Although Riss was a Colorado corporation and TM&E was an Illinois corporation, no vehicles were licensed in either the State of Colorado or the State of Illinois. Likewise, no vehicles were licensed in any of the other 22 states or the District of Columbia in which Riss operated.

During the years 1954 and 1955, Riss' operation with the above fleet of company owned equipment was such that there were approximately 35,000 vehicle movements on the highways of the State of Missouri. The Missouri Supreme Court found that approximately one-half of these movements were made by vehicles not licensed in the State of Missouri. The Missouri Supreme Court found that appellants were not entitled to reciprocity for the vehicles licensed as set out above and that, therefore, approximately one-half of the 35,000 vehicle movements on the highways of the State of Missouri were in violation of the laws of the State of Missouri.

THE ISSUES ATTEMPTED TO BE RAISED BY APPELLANTS DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

I.

The Missouri Motor Vehicle Registration Laws Do Not Constitute an Unreasonable Burden on Interstate Commerce.

Appellants contend that the Missouri vehicle registration laws, as interpreted in this case by the Missouri Supreme Court, place an unreasonable burden on interstate commerce. They admit that this Court has previously ruled to the contrary and ask this Court to change its position. From a reading of appellants' contentions it would appear that this involves only the single ruling of this Court in **Aero Mayflower Transit Co. v. Georgia Public Service Commission**, 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709. However, as is pointed out hereinafter, the appellants in fact ask this Court to overrule a long line of decisions which have universally upheld the constitutionality of comparable state motor vehicle registration statutes. In no case considered by this Court has a properly applied motor vehicle registration statute been found to be an unreasonable burden on interstate commerce.

Appellants seem to put great weight on their contention that the past cases decided by this Court involved fees of only nominal amount, while the fees here in question are substantial. However, it should be noted that many of the cases involved a tax which was repeated with each trip (such as ton-mile taxes or trip permits), which would result in taxation greatly exceeding $1,000.00 per

year if the vehicle were used so as to fully avail itself of the privilege of using the highways.

Section 301.020, RSMo, 1949, requires that the owner of every vehicle which operates on the highways of Missouri must register such vehicle and pay a tax thereon "except as herein otherwise expressly provided." The part of the statute above quoted refers to **Section** 301.270, RSMo, 1949, which grants reciprocity to certain nonresident owners. This is the only provision authorizing a legal operation of a motor vehicle on the highways of Missouri without first being registered with the State of Missouri.

Section 301.270, RSMo, 1949, was amended in 1957, but such amendment is not applicable to the case at bar. This statute authorizes a nonresident owner to operate or permit the operation of his vehicle on the highways of Missouri without first having registered the same in Missouri **if such vehicle is licensed in the place of residence of such owner.** This privilege is granted to the nonresident owner only to the extent that the place of such nonresident owner's residence grants like exemptions for residents of Missouri to operate their vehicles without registering the same. Thus, appellants could legally operate their motor vehicles in the State of Missouri only when such vehicles were registered in the State of Missouri or when they were registered in the state of residence of the owner. The Supreme Court of Missouri found that appellants did not register any vehicles in the state of their residence and, consequently, that they were not entitled to reciprocity under said **Section** 301.270, and that, therefore, all vehicles operated by appellants in the State of Missouri which did not bear Missouri licenses were illegally operated on Missouri highways. It is this situation which appellants now claim places an unreasonable burden on interstate com-

merce. However, it is submitted, as is shown hereinafter, that such is not the case; that the statutes of Missouri are in complete compliance with the repeated decisions of this Court and, further, that appellants have not introduced evidence upon which any determination of the reasonableness of Missouri license fees can be made.

The Missouri motor vehicle registration tax is imposed upon every owner whose motor vehicle is operated or driven upon the highways of this state (with exceptions provided in the reciprocity statute) and the fees for property carrying vehicles, such as are involved here, are graduated according to the gross weight of the vehicle and load carried. See **Section** 301.020, RSMo, 1949, and **Section** 301.060, RSMo, 1957 Supplement. By **Article IV, Section** 30 of the **Missouri Constitution** of 1945, all such fees, after the payment of the costs of collection, go to the maintenance of the Highway Department, the Highway Patrol, and to the road fund for the maintenance and construction of highways. The evidence is that there is no diversion of these funds, but that they, in fact, do go as directed by the Constitution.

This tax is levied upon the owners of all vehicles that operate on the highways of the State of Missouri. No distinction is made between those operated in interstate commerce and those operated in intrastate commerce; both are treated exactly alike. In such circumstances the Supreme Court of the United States has repeatedly held that such tax upon the privilege of using the highways, and to pay the costs of the construction and maintenance of highways and the policing and regulation of traffic thereon in the interest of safety, are within the powers of the state and do not constitute an unreasonable burden upon interstate commerce in violation of the commerce clause of the United States Constitution.

The first case on this subject decided by the Supreme Court of the United States was **Hendrick v. Maryland,** 235 U.S. 610, 59 L. Ed. 385, 35 S. Ct. 140, decided in 1914, and growing out of an incident occurring in 1910. In this case defendant claimed that the registration tax which was graduated according to the horse power of the vehicle was unconstitutional as placing an unreasonable burden upon interstate commerce just as do the appellants in the case at bar. The Supreme Court in denying this contention pointed out that the tax was one on the privilege of using the highways of Maryland, that is, of using the special facilities provided by the state and that such tax, as compensation for the use of such state facilities, did not burden interstate commerce. The Court said, l.c. 59 L. Ed. 391, 235 U.S. 623-624:

> "In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnished special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U.S. 691, 699, 27 L. Ed. 584, 587, 2 S. Ct. Rep. 732; Huse v. Glover, 119 U.S. 543, 548, 549, 30 L. Ed. 487, 490, 7 S. Ct. Rep. 313; Monongahela Nav. Co. v. United States, 148 U.S. 312, 329, 330, 37 L. Ed. 463, 469, 13 S. Ct. Rep. 622; Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 405, 57 L. Ed. 1511, 48 L.R.A. (N.S.) 1151, 33 S. Ct. Rep. 729, and authorities cited. The action of the state must be treated as correct unless the contrary is made to appear. * * *"

In the later case of **Clark v. Poor,** 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, the Supreme Court in considering the

same problem and speaking through Mr. Justice Brandeis, said l.c. 71 L. Ed. 1200, 274 U.S. 556-557:

> "The plaintiffs claim that, as applied to them, the act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under Sec. 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. Morris v. Duby, No. 372, decided April 18, 1927 [274 U.S. 135, ante, 966, 47 S. Ct. Rep. 548]. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Hendrick v. Maryland, 235 U.S. 610, 59 L. Ed. 385, 35 S. Ct. Rep. 140; Kane v. New Jersey, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. Rep. 30; Hess v. Pawloski, No. 263, decided May 16, 1927 [274 U.S. 352, ante, 1091, 47 S. Ct. Rep. 632]. Compare Packard v. Banton, 264 U.S. 140, 144, 68 L. Ed. 596, 607, 44 S. Ct. Rep. 257."

The Supreme Court of the United States has repeatedly considered this question and has uniformly held that the state may properly levy a non-discriminatory tax upon interstate carriers to compensate the state for the cost of constructing, maintaining and policing the highways which are used in such commerce. This is especially so when

applied to those engaged in the business of carriers who make the highways their place of business. In this connection see **Kane v. New Jersey,** 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30; **Hicklin v. Coney,** 290 U.S. 169, 78 L. Ed. 247, 54 S. Ct. 142; **Continental Baking Co. v. Woodring,** 286 U.S. 352, 76 L. Ed. 1155, 52 S. Ct. 595; **Dixie-Ohio Express Co. v. State Revenue Commission of Georgia,** 306 U.S. 72, 83 L. Ed. 495, 59 S. Ct. 435; **Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana,** 332 U.S. 497, 92 L. Ed. 99, 68 S. Ct. 167 and **Aero Mayflower Transit Co. v. Georgia Public Service Commission,** 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709.

The Supreme Court holds that where the tax is specifically levied for the privilege of using the highways there can be no question as to its constitutionality and that where the tax is levied without specific reference to the use of the highways, such tax is likewise clearly constitutional where the funds derived therefrom are, in fact, used for the construction, maintenance and policing of the highways of the state. The tax levied by Missouri, and in issue herein, clearly falls within both of these requirements. See **Clark v. Poor,** 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; **Dixie-Ohio Express Co. v. State Revenue Commission of Georgia,** 306 U.S. 72, 83 L. Ed. 495, 59 S. Ct. 435 and **Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana,** 332 U.S. 497, 92 L. Ed. 99, 68 S. Ct. 167. The state legislature, in determining the basis upon which it will levy its tax, has a wide discretion in the use of classifications in levying such tax and in determining what form of tax it will use, and unless its determination and classification is clearly unreasonable and bears no relation to the use of the highways, such tax is not held to violate the commerce clause of the Constitution. See **Aero Mayflower Transit Co. v. Georgia Public Service Commission,** 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709.

The Supreme Court has held that registration fees graduated or classified by the carrying capacity of the vehicle or by the weight of the vehicle, or by the weight and load of the vehicle or such a tax on a flat fee basis are constitutional and do not contravene the commerce clause of the United States Constitution. Thus, in **Hicklin v. Coney,** 290 U.S. 169, 78 L. Ed. 247, 54 S. Ct. 142, the court said, l.c. 78 L. Ed. 250, 290 U.S. 173:

> "* * * Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. Morris v. Duby, 274 U.S. 135, 143, 71 L. Ed. 966, 971, 47 S. Ct. 548; Sproles v. Binford, 286 U.S. 374, 388, 389, 76 L. Ed. 1167, 1178, 1179, 52 S. Ct. 581. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity, in furtherance of the same purpose. Clark v. Poor, 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, supra."

Further, see **Morf v. Bingman,** 298 U.S. 407, 80 L. Ed. 1245, 56 S. Ct. 756, wherein the court said, l.c. 80 L. Ed. 1249, 298 U.S. 412:

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. * * *"

See also, **Acro Mayflower Transit Co. v. Georgia Public Service Commission,** 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709; **Brashear Freight Lines v. Public Service Commission**

of Missouri, 23 F. Supp. 865, and **Brashear Freight Lines v. Hughes,** 26 F. Supp. 908.

As is shown above, such vehicle registration taxes are imposed for the privilege of using the highways. Such privilege is unlimited and the licensee may use the highways as much as he desires, or as little as he sees fit. The amount of use is strictly up to the licensee and no limit is imposed by the state. In this connection the Supreme Court, speaking through Mr. Justice Cordozo in **Aero Mayflower Transit Co. v. Georgia Public Service Commission,** 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709, said l.c. 79 L. Ed. 1443, 295 U.S. 289:

> "* * * The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. Clark v. Poor, 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, and Hicklin v. Coney, 290 U.S. 169, 78 L. Ed. 247, 54 S. Ct. 142, supra. **One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may.**" (Emphasis ours).

To the same effect see **Dixie-Ohio Express Co. v. State Revenue Commission of Georgia,** 306 U.S. 72, 83 L. Ed. 495, 59 S. Ct. 435, and **Brashear Freight Lines v. Public Service Commission of Missouri,** 23 F. Supp. 865.

In the case at bar appellants, admittedly, do both intrastate and interstate business. As is pointed out in **Bode v. Barrett,** 344 U.S. 583, 97 L. Ed. 567, 73 S. Ct. 468, the state can without question impose such license fees as it may see fit on one doing intrastate business, and since it does not appear that the operation in interstate commerce increased the charges imposed upon appellants, it is not necessary to consider whether or not such taxes conflict with the commerce clause. Thus, it is submitted that under the facts in

the present case appellants have no standing to raise such constitutional question.

If, in spite of the ruling in **Bode v. Barrett**, supra, we are to consider the reasonableness of the charge imposed by the Missouri motor vehicle registration tax on appellants for the privilege of using Missouri highways and to compensate Missouri for the cost of construction, maintenance and policing such highways, the burden of proof to prove such charges to be unreasonable rests upon appellants. This was clearly held by the Supreme Court in **Interstate Busses Corp. v. Blodgett**, 276 U.S. 245, 72 L. Ed. 551, 48 S. Ct. 230; where the court, speaking through Mr. Chief Justice Stone said, l.c. 72 L. Ed. 555, 276 U.S. 251-252:

> "That appellant is already contributing to highway maintenance is not in itself significant, for the state does not exceed its constitutional power by imposing more than one form of tax as a charge for the use of its highways in interstate commerce. It is for appellant to show that the aggregate charge bears no reasonable relation to the privilege granted."

See, also, **Capital Greyhound Lines v. Brice**, 339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806; **Bode v. Barrett**, 344 U.S. 583, 97 L. Ed. 567, 73 S. Ct. 468, and **Brashear Freight Lines v. Public Service Commission of Missouri**, 23 F. Supp. 865.

In connection with this burden of proof it should be remembered, as pointed out above, that the privilege of using the highways for which the tax is imposed is an unlimited privilege which the taxpayer may use as much or as little as he sees fit and consequently, and, unless and until appellants show that they have fully availed themselves of such privilege, cost figures based upon actual use of the highways are absolutely worthless and have no probative value on the question of the reasonableness of the charge imposed for the privilege. Thus, in **Dixie-**

Ohio Express Co. v. State Revenue Commission of Georgia, 306 U.S. 72, 83 L. Ed. 495, 59 S. Ct. 435, the Supreme Court said on this point, l.c. 83 L. Ed. 500, 306 U.S. 78:

> "Appellant's failure to disclose whether it fully availed itself of the privilege to use the roads leaves the figures reflecting actual use without foundation and worthless as a measure or indication of the value of that privilege. • • •"

Appellants have gone to great lengths to attempt to show the cost per mile to them for their actual use of the highways. As has just been pointed out, these figures have no probative value since their payment is for the privilege of using the highways and they may use them as much or as little as they see fit, and the evidence shows that some vehicles licensed in Missouri made only one or two trips over the highways of the State of Missouri during the year in question; whereas, others made almost daily trips. The same disparity in the use of Missouri highways applies equally to vehicles licensed in other states, some of which did not enter the State of Missouri at all during a year in question, others of which entered only once or a few times, and still others of which made almost daily trips over the highways of the State of Missouri. Thus, since appellants have seen fit to vary the use of the privilege by their various vehicles on the basis of business expediency, they cannot limit the permissible charge for such privilege to such actual use.

Appellants have introduced in evidence figures as to cost of construction and maintenance only as to a very small portion of the entire Missouri highway system. However, as is pointed out in **Brashear Freight Lines v. Hughes,** 26 F. Supp. 908, a state highway system must be considered as a whole. It cannot be segregated into parts, neither on the basis of use, nor on the basis of income from the use of the

system. Consequently, the figures used by appellants in the computations contained in their brief, which represent only a part of the Missouri highway system have no logical bearing on the reasonableness of the charge for the privilege of using such highways since these figures are based on only a very small part of the entire system.

Furthermore, appellants have not introduced into evidence and have not included in their calculations the cost of policing the highways which is a proper and necessary factor to be considered in determining the reasonableness of the charge for the privilege of using the highways, as has been pointed out above.

Likewise, appellants have not even introduced evidence as to the cost of construction and maintenance of all of the highways over which they have authority to operate, as shown by Exhibits 4 and 665. Examination of Exhibit 4 shows that Riss has I. C. C. authority to operate on many miles of highway for which they introduced no cost figures. They did not introduce cost figures for the following highways over which they have authorized routes: U. S. 65 from Sedalia to the junction of Highway 40 (M.C. 200 sheet 3); U. S. 54 from Kingdom City to the Mississippi River Bridge at Louisiana (M.C. 200 sheet 3); U. S. 69 and Missouri 6 from Cameron to the junction of Missouri 6 and U. S. 24 near Hannibal (M.C. 200 sheet 73); Missouri 7 between U. S. 24 and U. S. 40 (M.C. 200 sub. 11); U. S. 67 from St. Louis to the Mississippi River at the Alton Bridge (M.C. 200 sub. 30 sheet 2); U. S. 71 and U. S. 275 from St. Joseph to the Iowa line (M.C. 200 sub. 46, p. 3); By-pass of U. S. 40 and Alternate U. S. 40 from Wentzville to St. Louis (M.C. 200 sub. 46, p. 2, Jan. 5, 1954), and Newton County U and Missouri 43 from the Oklahoma line to Joplin (M.C. 200 sub. 106). In addition to these, Riss has various irregular route authority whereby they may and do use vari-

ous other highways of the State of Missouri. In this connection the record of driver arrests introduced in evidence shows arrests in such places as Cape Girardeau County, which is far from any regular route authorization of appellants.

Thus, it appears that even if it were assumed for the purposes of argument that Riss could properly consider only the costs of construction, maintenance and policing of the highways over which they operate in the State of Missouri rather than the cost of the whole highway system, it appears that appellants have failed and refused to submit evidence as to the cost of construction, maintenance and policing of all of the highways over which they, in fact, operate and thus the comparison even on the basis that appellants claim is not substantiated.

It is, therefore, submitted that this Court has uniformly upheld the constitutionality of state motor vehicle registration statutes such as those involved in the case at bar, and that appellants have shown no reason why such matter should be reconsidered at this time. Further, it appears that appellants have not adduced the evidence necessary for a determination of the reasonableness of the motor vehicle registration fees charged by the State of Missouri, and that, therefore, even if this Court were inclined to reexamine the question, no intelligent determination of the issue could be made. It is, therefore, urged that this issue as attempted to be raised by appellants, presents no substantial federal question for the determination of this Court.

II.

The Missouri Motor Vehicle Registration Statutes Do Not Deny to Appellants the Equal Protection of the Laws by Reason of Imposing a Greater Charge upon Those Engaged in Interstate Commerce Than Is Imposed upon Those Engaged in Intrastate Commerce.

In Point II of their jurisdictional statement, appellants contend that the Missouri motor vehicle registration laws deny equal protection to appellants because, being engaged in interstate commerce, they are charged more for the privilege of using the highways of the State of Missouri than would be a similar carrier operating solely in intrastate commerce. The basis of this contention appears to be that from the nature of things when one is engaged in interstate commerce his vehicle will be in Missouri only a part of the time; whereas, when one is engaged in intrastate commerce his vehicles will be in the State of Missouri all of the time and that, therefore, the intrastate vehicle will be able to operate more miles or more trips than will the interstate vehicle for the same fee. Thus, discrimination is claimed against interstate commerce. However, this ignores the facts of the situation. The evidence here shows that some of appellants' vehicles operate almost exclusively in the State of Missouri, whereas, others operated only occasionally within Missouri. Those vehicles which operated exclusively in the State of Missouri would use the Missouri highways as much as if not more than a comparable intrastate carrier. The difference in the use of the Missouri highways by the various vehicles of appellants demonstrates, graphically, the validity of the point made by Mr. Justice Cordozo in **Aero Mayflower Transit Co. v. Georgia Public Service Commission**, 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709, that the carrier is free to use his vehicle as much or as little as he desires and that the reason-

ableness of the fee charged cannot be measured by actual use.

If appellants' argument were to be extended to its logical conclusion it would result in a claim that the Missouri motor vehicle registration fees are reasonable for those of its vehicles which are used extensively on the highways of Missouri and are unreasonable for those of its vehicles which use the Missouri highways only infrequently. This points up the real basis of appellants' argument which is that any flat fee is a violation of the equal protection clause of the Fourteenth Amendment, and that a state can, constitutionally, only charge a motor vehicle registration fee which is directly related to actual use of the highway or can only charge a nominal fee.

Appellants' argument seems to be based on a contention that they are required to license all of their vehicles in Missouri whether they operate in Missouri or not. This, of course, is not the case. Appellants are required to have Missouri licenses for only those vehicles which they operate in Missouri and appellants are free to determine for themselves what vehicles, and how many vehicles, will be operated in the State of Missouri.

Appellants contend that they are faced with demands from other states, but the evidence in the case does not support this contention. Appellants did present some testimony that the State of Oklahoma demanded that they license twenty vehicles in Oklahoma. However, there was no contention or showing that this was based upon any provision of Oklahoma law or that the so-called demand resulted from anything other than the individual ideas of some un-named official of the State of Oklahoma. There was no evidence of any demand for vehicle registrations by the states of New York, New Jersey, Pennsylvania,

Kentucky or Delaware that appellants license vehicles in their states, yet the evidence shows that the vehicles were, in fact, licensed in these states; also, the evidence does not show that the other states in which appellants operate demanded any licenses and if such demands were made apparently appellants successfully resisted them for they did not license any of their vehicles in such other states. The evidence shows that appellants did not, in fact, operate any of their vehicles with more than one license on such vehicle at any one time. In fact, appellants did not engage in the practice known as "double plating", i. e., operate a vehicle which has been registered in and bears the license of more than one state.

Appellants claim that the Missouri motor vehicle registration tax discriminates against interstate commerce and denies them the equal protection of the law for the reason that in the nature of things (they contend) that one engaged in intrastate commerce will use his vehicle on the Missouri highways more than one engaged in interstate commerce, and yet both must pay the same fee. They thus contend that they pay more for the use of the highways than one engaged strictly in intrastate commerce. This argument, of course, overlooks the fact as pointed out above, that the privilege of using the highways is unlimited as to each and the Supreme Court of the United States has repeatedly held that where the tax is imposed without discrimination or difference on both intrastate and interstate commerce that no unconstitutional discrimination results merely from the fact that one may use the privilege more than the other. This, the court holds, is strictly a matter which is up to the taxpayer. Difference in use is not imposed by the state and no complaint can validly be made thereof. The state clearly has a right to regulate and tax the privilege of using its highways by

both residents and nonresidents. See **Hendrick v. Maryland**, 235 U.S. 610, 59, L. Ed. 385, 35 S. Ct. 140. In **Kane v. New Jersey**, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30, the Supreme Court, speaking through Mr. Justice Brandeis, stated, l.c. 61 L. Ed. 227, 242 U.S. 167:

> "The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety. * * *"

See also **Brashear Freight Lines v. Public Service Commission of Missouri**, 23 F. Supp. 865.

In support of their contention of a denial of equal protection appellants make the argument that under the laws of Missouri they must buy more than one license plate for the same vehicle during the same year, because they are required to return the license plate to the State of Missouri any time one of their vehicles is outside the State of Missouri for more than ninety days at a time. Although appellants do not cite the statute they are apparently referring to the provisions of **Section** 301.120, RSMo, 1957 Supplement. This contention was presented to the Supreme Court of Missouri, which court determined that it was not an actual issue in the case. Appellants have never taken any action in compliance with their claimed construction of this statute and, of course, cannot now claim that they have been injured thereby. As a matter of fact, this issue is set up as a straw issue for the sole purpose of claiming injury where none has, in fact, occurred. Likewise, this contention is based upon a strained and erroneous construction of this statute. This statute has never been construed by the courts of the State of Missouri, and the

Supreme Court of Missouri did not find it necessary to construe this statute in the present case. It is submitted that, in fact, this statute merely provides for the returning of license plates when the owner thereof no longer has any legal use therefor. In any event, it cannot validly be contended that the statute results in higher taxes on interstate commerce. This especially in view of the fact that it has never been applied to appellants and appellants have never taken any action thereunder.

It is, therefore, submitted that under the decisions of this Court appellants are not denied the equal protection of the laws as contended in Point No. II of the appellants' jurisdictional statement.

III.

The Missouri Motor Vehicle Registration Statutes Do Not Deprive Appellants of Equal Protection of the Laws by Refusing to Grant Reciprocity to Appellants.

The arguments contained in Point No. III of their jurisdictional statement apply only to the appellant Riss, and have no applicability whatsoever to the appellant TM&E. However, the evidence showed that in some instances the licenses for the vehicles operated by Riss were procured by TM&E and in other instances they were procured by Riss.

The Missouri motor vehicle registration statutes are imposed upon all who use Missouri highways. Those who are engaged in interstate commerce and those who are engaged in intrastate commerce are treated exactly alike. All vehicles using Missouri highways must be registered under the Missouri motor vehicle registration statutes, unless they are entitled to reciprocity under the provisions of **Section** 301.270, RSMo, 1949. Such reciprocal provisions

allow a nonresident owner to operate his vehicles on Missouri highways without registering the same in Missouri. In order to qualify for reciprocity the vehicle must be registered in the state of the owner's residence. Appellants refused to license any of their vehicles in the state of their residence. Riss is a Colorado corporation and, therefore, a resident of Colorado, but no vehicles were licensed in Colorado; TM&E is an Illinois corporation and, therefore, a resident of Illinois, but no vehicles were licensed in Illinois. No such Illinois licenses were used because the cost was too high.

Appellants ignore TM&E home residence in Illinois and their failure to use Illinois licenses. They base their argument only upon the situation as it applies to Riss. In the first place, Riss did not use any Colorado licenses and, therefore, is in no position to complain that they were improperly denied reciprocity. It is axiomatic that one cannot contend for unconstitutional discrimination and a denial of equal protection thereby on a hypothetical fact situation, *i. e.*, on a fact situation which does not coincide with the circumstances of the one complaining.

The basis of appellants' contention in this connection is that there is no reciprocity between the states of Missouri and Colorado because Colorado imposes a ton-mile tax and will not grant reciprocity as to such tax. As a result thereof, under the Missouri statutes, Missouri does not and cannot grant reciprocity to the residents of Colorado. On this basis Riss contends that it is discriminated against because of the accident of its having been incorporated under the laws of the State of Colorado. It should be here understood that reciprocity is granted on the basis of the two states in question treating each other's residents in the same manner. Thus, if Missouri's residents are not charged in Colorado, Colorado's residents are not charged in Mis-

souri. On the other hand, if Colorado charges Missouri residents, Missouri charges Colorado residents. However, Riss' argument seems to be that Missourians have to pay when they use their vehicles in my home state of Colorado, but it is unconstitutional and a violation of equal protection for Missouri to require me to pay when I go to Missouri. This, of course, ignores the entire theory upon which reciprocity statutes are based

There was no requirement that Riss be incorporated under the laws of the State of Colorado. This was strictly a matter of choice for those who incorporated Riss, and Riss cannot now claim privileges which it would have had if it had been incorporated in some other state, when in fact it is a Colorado corporation. The Missouri reciprocity statute classifies the owners of motor vehicles on the basis of their residence. Residents of a reciprocating state may operate their vehicles in Missouri without Missouri registration. This for the reason that such reciprocating state allows Missourians to operate their vehicles in that other state without registration in such other state. It is submitted that such is a valid classification and such classification has, in fact, been approved by this Court. The decisions of this Court make it clear that the granting of an exemption from a tax by such reciprocity provisions does not, in fact, constitute a discrimination, and does not deny to those who cannot bring themselves within the exemption the equal protection of the laws. It makes no difference whether the motor vehicle registration statutes have reciprocity provisions or require everyone to register and pay the tax and grant no reciprocity, there is no discrimination or denial of equal protection. This has been clearly and explicitly decided by this Court in such cases as **Kane v. New Jersey,** 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30; **Storaasli v. Minnesota,** 238 U.S. 57, 75 L. Ed. 839, 51 S. Ct.

354, and **Bode v. Barrett,** 344 U.S. 583, 97 L. Ed. 567, 73 S. Ct. 468.

As a matter of fact, appellants could have so conducted their business as to be entitled to reciprocity for the operation of their vehicles in Missouri. The State of Missouri has reciprocity with the State of Illinois; TM&E is an Illinois corporation and, therefore, a resident of Illinois. As has heretofore been pointed out, under the method of operation adopted by appellants, some of the vehicles were licensed in the name of TM&E and some in the name of Riss. If TM&E had secured licenses for these vehicles in the State of Illinois it would have been entitled, by reason of reciprocity, to operate or permit the operation of these vehicles in Missouri without registering the same under the Missouri registration statutes. However, appellants refused to take this course of action because Illinois licenses cost too much. Instead appellants chose to license their vehicles in states with low registration fees and in accordance with their own ideas of their economic advantage. In other words, appellants picked the states in which they would license their vehicles for reasons of their own, without regard to the laws of the State of Missouri, and now complain because they are not granted reciprocity for such vehicles so licensed.

It is, therefore, submitted that since appellants do not qualify under Missouri statutes for the exemption to the Missouri motor vehicle registration tax provided by the Missouri reciprocity statute, that they cannot complain on constitutional basis. Appellants have not licensed any of their vehicles in the state of their residences and, therefore, they cannot qualify for this exemption. Since they have not so licensed their vehicles they cannot complain as to what the situation might be if they had, in fact, licensed their vehicles in the state of their residence. Further,

as has been specifically held in the cases above cited, such reciprocity exemptions do not constitute a violation of equal protection.

Even if Riss were in a position to complain about the lack of reciprocity between Missouri and Colorado, it is submitted that such lack of reciprocity, which is based upon the refusal of the State of Colorado to grant like reciprocal provisions to residents of the State of Missouri, is in nowise a violation of equal protection. Furthermore, the fact that residents of other states may be entitled to reciprocity does not amount to a denial of equal protection to Riss who is a resident of Colorado.

CONCLUSION.

It is, therefore, on the basis of the foregoing, respectfully submitted that the questions attempted to be raised by appellants in the case at bar do not present substantial federal issues, and that this Court should not take jurisdiction in this cause.

Respectfully submitted,

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